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IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1325

GEORGE L. DUGGAN, *et al.*,
Petitioners,
v.
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners, GEORGE L. DUGGAN, F. ALFRED ROWORTH, FRANKLIN E. TODD, Jr., JACK V. GRAH, WILLIAM W. BENJAMIN, HERBERT R. NICKEL, KENNETH J. HILLEREN, ROYCE L. JAPHET, RICHARD L. AITKINS, JOHN B. SCHRICKER, CECIL R. WILSON, FRANK L. HARRINGTON, JAMES F. DEMPSEY, KENNETH G. MAAS, W. O. PARSINEN, WILBUR F. OLSEN, ARTHUR G. TINGLEY, Jr., JOHN D. LAWSON, MELVIN P. ENGLISH, GORDON C. LARSON, ROBERT O. BUCK, DONALD E. HACKETT, JAMES F. FREITAS, VICTOR K. LaMAY, DONALD B. BLOCK, CHARLES R. GIDEON, JOSEPH B. HYLAND, BENJAMIN H. GOWEN, DALE L. MILLER, GENE E. BROCKETT, JOHN N. HANSON, JEROME T. BAR-

RETT, JOHN F. GRIMM, LLOYD C. EDLUND, STEVE G. RADJENOVICH, LOREN W. CUNLIFF, WILLIAM J. UNDIS, DONALD R. BRIEST, ORVILLE D. FUNK, FRANK A. TSUBOI, RALPH G. COOK, FRANCIS COZART, RICHARD R. HASELMEN, Jr., ROBERT M. FULLER, KEITH L. DEAVER, ROY O. BEMIS, GILBERT W. KRAMER, DAVID REPLOEG, ROBERT E. DOWD, JOHN K. CONDON, LAWRENCE SCHLEINING, DONALD V. OLIVER, NORMAN L. DAGGETT, EDWARD K. HAUPT, JAMES J. SHOBERG, KENNETH E. HUBBARD, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on January 24, 1975.

OPINIONS BELOW

The judgment of the district court granting the order to dismiss is unreported and without opinion and was signed February 22, 1973 and filed and entered February 26, 1973; a copy is contained in Appendix A, page A-5, of this brief.

The opinion of the Court of Appeals for the Ninth Circuit presently exists only in slip form and has no Federal Reporter citation; the opinion was entered and filed January 24, 1975 and a copy is contained in Appendix A, page A-1, of this brief.

JURISDICTION

The judgment of the Court of Appeals is dated January 24, 1975 and was entered on the same date. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Do the petitioners, who are airline employees covered by the Railway Labor Act (45 U.S.C.A. § 151, *et seq.*) state a cause of action against their own union, the International Association of Machinists (I.A.M.) upon a claim for relief based upon a *compensatory theory* for restitution of the value of job rights severed, due to appropriation and bargaining away by their union to maximize the majority benefit?

II. Are such employees relegated in law solely to recovery upon a *punitive theory* requiring a showing of hostile or arbitrary motive against them by the union or, under the rule of *Vaca v. Sipes*, 386 U.S. 171 (1967), displacing state law and remedies governing union internal affairs and substituting "governing federal standard," does the new federal law applicable thereunder include law and remedies based upon *compensational* theories similar to those available formerly under state law?

III. Is a collective bargaining contract of such a continuing nature that a union (even though entitled to diminish the benefits of certain members where it has negotiated in good faith) has a duty to pay compensation and aid adjustments, as an internal union organizational affair, to minority members of the union who have been severed from any and all possibility of job retention due to contract terms negotiated to benefit the majority of the union's members, and if so;

IV. Does a cause of action exist in law for enforcement of that duty and restitution in quasi contract for the severance value utilized by the majority to maximize its benefit, and;

V. Did the United States Court of Appeals err in not recognizing such a compensatory cause of action in quasi contract for restitution of property and in not reversing the United States District Court?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article I, § 8 and Article VI of the Constitution of the United States; it also involves the Railway Labor Act, 45 U.S.C.A. § 151, subsections 1, 4, 5, 6, 7; § 151(a); § 152, subsections 1, 2, 3, 4, 5, 6, 7, as made applicable to air carriers by 45 U.S.C.A. § 181 and § 182. These are reprinted in pertinent part in Appendix B, *infra*.

Actually, the case was initiated as a state court action. The respondent, I.A.M., petitioned for removal to the United States District Court; the case was accepted by the Court for the Western District of Washington, at Seattle, perhaps improvidently, vis a vis, the cause of action concerning internal affairs of the union instantly at bar herein. *International Machinists Assoc. v. Gonzoles*, 356 U.S. 617 (1957). The petition for removal (contained in Appendix A, page A-....) involves 28 U.S.C.A. §§ 1441, 1446. (Appendix B, page A-17)

STATEMENT OF THE CASE

Jurisdiction of the trial court was based upon the Railway Labor Act and the International Association of Machinists' petition for removal of the action from the state court, which case was accepted by the U.S. District Court for the Western District of Washington at Seattle.

The petitioners are a group of flight engineers, qualified for employment on piston-engine aircraft but for various reasons unable to satisfy jet-flight-engineer requirements.

who lost their jobs with Northwest Airlines, Inc. They sued their labor union for an alleged breach of its duty to provide fair representation in the acrimonious bargaining which plagued the airline industry for several years after the introduction of jet aircraft. The district court dismissed the action.

The plaintiffs concede that they are unable to allege bad faith or a hostile attitude toward their group in the defendant union's industry-wide bargaining. The bargaining and a strike settlement resulted in substantial benefits for other members of the machinists' union, but proved disappointing to the flight engineers. Their displeasure was exacerbated when they learned that flight engineers for two other airlines, represented by another union, had obtained substantial severance-pay awards on similar job losses. Also, petitioners' union, I.A.M., took the position before the National Mediation Board during the statutory conciliation process that the petitioners' severance rights were worth one thousand dollars.

However, the union, in renegotiating the expired contract took a position, not in bad faith or with a hostile motive and not without a reasoned weighing of alternatives, that it could not save the employment of all its members without disastrous effects on the level of benefits enjoyed by the majority of union members. The union negotiators then pushed for a contract "package" which provided maximum total utility to the union membership. This package called for pilot qualification of all engineers who had mechanic seniority.

Illustrative for this statement is the result upon Clarence Moon, a petitioner herein. Mr. Moon did not have any

mechanic seniority but rather had only flight engineer seniority; only mechanic seniority was allowed by the collective bargaining "package" as a basis for application for pilot qualification. Mr. Moon was refused any attempt at pilot qualification by Northwest Airlines because he did not have any mechanic seniority.

Mr. Moon does not now pursue the action on a punitive basis, but seeks restitution compensation from those remaining members of the I.A.M. who benefited because he was sacrificed.

REASONS FOR GRANTING THE WRIT

This court should grant a writ of certiorari in petitioners' favor to the Ninth Circuit Court of Appeals because that court decided an important question of new law as to what the governing federal standards of law will provide for remedies and duties concerning union internal affairs and fair representation of members, and that decision involves issues which have not been, but should be, settled by this court.

Prior to *Vaca v. Sipes*, 386 U.S. 171 (1967), the resolution of internal union affairs was largely one of state jurisdiction using state law, either statutory or common law of the resident state. For example, in *International Machinists Assoc. v. Gonzoles*, 356 U.S. 612 (1957), Mr. Justice Frankfurter said for the majority:

> "But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to § 8 (b) (1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules

> with respect to the acquisition or retention of membership rights therein'. . . . The present controversy is precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for 'retention of membership therein.' Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights.
>
> * * *
>
> "No radiation of the Taft-Hartley Act requires us thus to mutilate the comprehensive relief of equity and reach such an incongruous adjustment of federal-state relations touching the regulation of labor. The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages. Although, if the unions' conduct constituted an unfair labor practice, the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered."

However, in 1967, *Vaca v. Sipes, supra,* changed the state law standard to one of the governing federal standard as the court said at page 174:

> "Although we conclude that state courts have jurisdiction in this type of case, we hold that federal law governs, that the governing federal standards were not applied here, and that the judgment of the Supreme Court of Missouri must accordingly be reversed."

This new standard of governing federal law creates a question of first impression and great magnitude to this court as to whether the federal standard will sanction and permit remedies to union members similar to those which

they could expect at the state court level. The scope of remedies question is instantly raised and the petitioners here seek what is essentially an equitable remedy of an impressed trust under a theory of restitution. This quasi contract/restitution remedy lays upon a compensational theory as opposed to the traditional "fair representation" remedy which lays upon an exemplory theory to punish bad conduct by the union.

The existence of a duty of fair representation as a matter of federal law, has long been recognized, with its punitive reaction to breach. It was first enunciated in a series of cases arising under the Railway Labor Act, in which this court held that by empowering unions to act as exclusive bargaining agents for employees, the statute also intended "to impose on the bargaining representative . . . the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 202-03 (1944). See also, *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944). The same principle has been held applicable in cases arising under the National Labor Relations Act. *Humphrey v. Moore*, 375 U.S. 335, 342 (1964).

However, this *Steele* doctrine, even as modified by *Vaca* has been analyzed by two leading commentators as inadequate to protect the union member from his own union in many instances. Cox, Archibald, "Rights Under Labor Agreement," 69 How. L. Rev. 601 (1969); Wellington, Thomas, "Union Democracy and Fair Representative Federal Responsibility in a Federal System," 67 Yale L.J. 1329 (1967).

In addition, there should be room in the new federal scheme for an approach which would allow the trial court to determine and insure equity between the parties. Such remedial flexibility will protect individual property and employment rights and promote labor and social peace more surely than the rigid myoptic *Steele* doctrine.

As to the judicial overseeing of internal union affairs, the petitioners ask this court, as part of its new federal governing standard, to allow its district courts to adjudicate the "duty of fair representation" cases within its equity power.

This approach would instantly treat the union as a federally sponsored trustee that has broad fiduciary powers to negotiate as necessary for industrial harmony to maximize the benefits for the bargaining unit. At the same time the union would be held financially responsible for *some* degree of *reimbursement* duty for divested rights which are of an accrued or admitted existence. This would be the normal state approach to trusts.

> "As between the beneficiaries and the outside world, it is the trustee who represents the estate and the beneficiaries of the trust. . . . The courts, have held that it is for the trustee and not for the beneficiaries to maintain an action . . . the beneficiaries cannot proceed against the third person, but can only proceed against the trustee for breach of trust in permitting the claim to be barred." *Scott on Trusts*, § 282.

The Ohio State Supreme Court took this position in *Jennings v. Jennings*, 91 N.E.2d 899 (1949), as a state common law remedy.

The question then is whether the federal substantive law should allow an action in quasi contract for the restitution of the value of vested property rights taken from a minority

of the membership for the goal of industrial harmony. Appellants submit that there is such a cause of action occurring to them on the facts instant here, where the employment relationship and the union membership were totally and forever divested to maximize the majority benefit.

The I.A.M. was in trust position to protect their employment rights; and that the trust as to them was breached when the union negotiators maximized the recovery for the bargaining unit as a whole, but (a) failed to readjust the increments gained to reimburse appellants for severed employment which was a foreseeable incident of the negotiated settlement, and (b) caused a complete and total abrogation of their employment position and opportunity.

The equitable theory of quasi contract, or restitution upon an impressed trust, are familiar and old state remedies that should have been available under *Gonzoles, supra,* if it were not for *Vaca, supra.* The federal courts and the common law recognize the remedy. For example the *Restatement of Restitution* states in Section I:

> *"A person who has been unjustly enriched at the expense of another is required to make restitution to the other."*

The comments A, B, and C, to Section I explain:

> "(A) A person is enriched if he has received a benefit. A person is unjustly enriched if the retention of the benefit would be unjust . . .
>
> "(B) What constitutes a benefit, a person confers a benefit upon another if he . . . in anyway adds to the other's security or advantage . . .
>
> "(C) *Unjust retention of benefit,* even where a person has received a benefit from another, he is liable to pay therefore only if the circumstances of its receipt or

> retention are such that, as between the two persons, it is unjust for him to retain it."

The theory of restitution in quasi contract is explained by the Circuit Court of Appeals, Third Circuit in *Bails v. Reconstruction Finance Corporation*, 128 F.2d 857, 859 (1942):

> "Unlike true contracts, quasi-contracts are not based on the apparent intention of the parties to do or to forbear doing a particular thing. A quasi-contract does not arise out of a promise. See Restatement, Contracts (1939) §5. In fact it is imposed in direct opposition to the intention of the party charged therewith. Such contracts are the means which the law has adopted to raise up obligations in order to promote justice. See *Hertzog v. Hertzog*, 29 Pa. 465, 467, 468; 1 Williston on Contracts (rev. ed. 1936) §3, pp. 7-10. Thus, one who is unjustly enriched at the expense of another may be required for that reason alone to make restitution. Restatement, Restitution (1937) §1."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted so that this court can decide the scope and nature of the new governing federal standards and whether they displace traditional state remedies available.

Respectfully sbumitted,

CLAY NIXON
Attorney for Petitioners

APPENDIX A

Opinions Rendered Previously Herein

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE L. DUGGAN, F. ALFRED ROWORTH, FRANKLIN E. TODD, JR., JACK V. GRAH, WILLIAM W. BENJAMIN, et al., *Plaintiffs-Appellants,* v. INTERNATIONAL ASSOCIATION OF MACHINISTS, a voluntary association, *Defendant-Appellee.*	NO. 73-1870 OPINION

[January 24, 1975]

Appeal from the United States District Court for the Western District of Washington at Seattle

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Before: CHOY and GOODWIN, Circuit Judges, and BURNS,* District Judge.

GOODWIN, Circuit Judge:

A group of flight engineers, qualified for employment on piston-engine aircraft but for various reasons unable to satisfy jet-flight-engineer requirements, lost their jobs with Northwest Airlines, Inc. They sued their labor union for an alleged breach of its duty to provide fair representation in the acrimonious bargaining which plagued the airline industry for several years after the introduction of jet aircraft. The district court dismissed the action. We affirm.

The plaintiffs concede that they are unable to allege bad faith or a hostile attitude toward their group in the defendant union's industry-wide bargaining. The bargaining and a strike settlement resulted in substantial benefits for other members of the machinists' union, but proved

*The Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

disappointing to the flight engineers. Their displeasure was exacerbated when they learned that flight engineers for two other airlines, represented by another union, had obtained substantial severance-pay awards on similar job losses.

Because the district court thought that the plaintiffs, through their former counsel, had been dilatory in the prosecution of their claim, the court granted a motion to dismiss for want of prosecution. Fed. R. Civ. P. 41(b). The court also granted a motion to dismiss on the merits for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6).

The correctness of both rulings has been challenged here, but because we agree that the trial court correctly dismissed the case upon the merits there is no need to venture upon the more difficult search for the minimum level of "on-again-off-again" diligence necessary to withstand a motion to dismiss for failure of prosecution. *Compare Rollins v. United States*, 286 F.2d 761, 764-65 (9th Cir. 1961), with *Boling v. United States*, 231 F.2d 926, 928 (9th Cir. 1956).

The district court purported to grant a judgment on the pleadings under Rule 12, but more accurately can be said to have granted a summary judgment, because it considered matters outside the pleadings. This labeling error is inconsequential, as the appellants concede, because no material facts were or are in dispute. The dismissal was based solely on the failure of the plaintiffs to find a legal theory that would support their claim.

Prior to the dismissal, the plaintiffs attempted to substitute a third amended complaint for their second amended complaint. The court refused the substitution. The appellants now contend that the third amended complaint merely clarified earlier claims and that the theory it advanced—quasi-contract—had been adequately raised, under liberal federal pleading standards, by the second amended complaint. Assuming, without deciding, that the motion for leave to file a tardy amendment was well taken, the question is whether summary judgment in favor of the defendant on a claim sounding in quasi-contract is proper.

Because there is no factual dispute, and because the appellants seek summary disposition by this court, there is no need to remand. *See S & S Logging Co. v. Barker*, 366 F.2d 617, 623 (9th Cir. 1966).

The governing federal law emanates from the Railway Labor Act, 45 U.S.C. §§ 151 *et seq*. While decisions under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq*., do not control, they do furnish guidance. *See Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 383-84 (1969).

A union member covered by the National Labor Relations Act may recover against a union for breach of its duty of fair representation only when he can show that its conduct toward him has been "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). *Vaca's* reference to "arbitrary" action broadened the scope of union duty, and thus undermined cases like *ILWU v. Kuntz*, 334 F.2d 165 (9th Cir. 1964), relied on by the appellee, which required a showing of "a bad faith motive, an intent to hostilely discriminate," 334 F.2d at 171. *See Beriault v. Local 40, ILWU*, 501 F.2d 258, 264 (9th Cir. 1974); *Retana v. Local 14, AMHEOU*, 453 F.2d 1018, 1023 n.8 (9th Cir. 1972).

But *Vaca v. Sipes* does not improve the appellants' prospects. They conceded, in a *Memorandum* in Support of a Motion for Reconsideration, that "it has become patent that IAM [International Association of Machinists] did not exhibit any hostile motivation or any arbitrary action against a certain minority of flight engineers . . . ."* [See petitioners' footnote below] This concession precludes re-

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Petitioners would direct attention to the asserted quote in its entirety (R. 572):

> "It has become patent that IAM did not exhibit any hostile motivation or any arbitrary action against a certain minority of flight engineers, at least insofar as the word arbitrary would be defined by law sufficient to be a basis for liability in this case." (*i.e.*, punitive theory of law in *Vaca*.)

The union decision at issue here was "arbitrary" in the dictionary sense of the word, but was not "arbitrary" as court decisions currently have defined "arbitrary" as a concept involving a lack of good cause (*i.e., Vaca*). *Vaca* still remains *punitive* in its underlying theory while petitioners seek to recover on a compensatory scheme. Such recovery is recoverable in a state court under the state law and remedies (restitution in quasi contract); but *Vaca* made the law solely a federal governing standard and

covery under *Vaca*. If *Vaca* is said to not affect the standard of duty under the Railway Labor Act, then the pre-*Vaca* cases such as *Hardcastle v. Western Greyhound Lines*, 303 F.2d 182, 185 (9th Cir.), *cert. denied*, 371 U.S. 920 (1962), would continue to apply.

The appellants urge that despite their lack of a cause of action under *Vaca* they should be allowed to recover on a theory of quasi-contract. Such relief would be impermissible under the circumstances. Liability under a quasi-contract "arises where the law imposes a duty upon a person . . . ." *Schenley Distillers Corp. v. Kinsey Distilling Corp.*, 136 F.2d 350, 352 (3d Cir. 1943). No law imposes a duty here. If quasi-contractaul relief were grounded on a duty other than that prescribed by *Vaca*, then this court would necessarily be creating a new duty. We would be departing from *Vaca* because, as the appellants concede in their brief on appeal, federal labor law furnishes the only source of duty here. We decline to depart from *Vaca*.

The judgment for the defendant is affirmed.

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now the vacuum exists brought about by displacement of state remedies. Actually, perhaps the respondent's petition for removal of this part of the action was improvidently accepted by the United States District Court, which had no jurisdictional mandate to usurp the state court of its jurisdiction on this portion of the cause.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

GEORGE L. DUGGAN, et al., *Plaintiffs,* v. INTERNATIONAL ASSOCIATION OF MACHINISTS, a Voluntary Association, *Defendant.*	CIVIL NO. 6069 ORDER OF DISMISSAL

The Plaintiffs in this suit are represented by Attorneys Clay Nixon, 3831 Seattle-First National Bank Building, Anthony Schwab, 3226 Portage Bay Place East and Arnold J. Barer, 805 11 Arctic Building, all of Seattle, Washington. The Defendant in this case is represented by Plato Papps of Washington, D. C. and Hugh Hafer of Seattle, Washington. On November 10, 1972 the Court entered an order denying the motion of Messrs. Nixon and Schwab for substitution as counsel for Mr. Barer, but entered an order allowing the association of Mr. Nixon with Mr. Barer as counsel for the Plaintiffs in this case. At that same time the Court entered an order granting the Defendant's motion to dismiss the complaint. This order was entered subject to the right of the Plaintiffs to file a motion for reconsideration. Such motion was duly filed, briefs were submitted by all parties and the case came on for hearing before the Court on Friday, January 19, 1973.

The Court after having considered its files and records, the briefs and memoranda and argument of all counsel, hereby enters the following order:

1. The motion of Attorney Clay Nixon to be substituted for Attorney Arnold J. Barer as counsel for the Plaintiffs is granted;

2. The Court reconsiders and hereby reaffirms its previous oral order denying Plaintiffs' motion to file a third amended complaint;

3. The Court reconsiders and reaffirms its previous oral order dismissing Plaintiffs' cause of action as stated in the

second amended complaint on the ground of a failure to prosecute and on the further ground that the said complaint fails to state a claim on which relief can be granted.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Mr. Clay Nixon is substituted for Attorney Arnold J. Barer as counsel for the Plaintiffs; that Plaintiffs' motion to file a third amended complaint is denied and that the complaint on file in this case is dismissed with prejudice and without costs.

DATED this 22nd day of February, 1973.

/s/ WILLIAM J. LINDBERG

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

GEORGE L. DUGGAN, F. ALFRED ROWORTH, FRANKLIN E. TODD, JR., WILLIAM W. BENJAMIN, HERBERT R. NICKEL, KENNETH J. HILLEREN, ROYCE L. JAPHET, RICHARD L. AITKINS, JOHN B. SCHRICKER, CECIL R. WILSON, JAMES F. DEMPSEY, KENNETH G. MAAS, W. O. PARSINEN, JACK V. GRAH, WILBUR F. OLSEN, ARTHUR G. TINGLEY, JR., JOHN D. LAWSON, MELVIN P. ENGLISH, GORDON C. LARSON, ROBERT O. BUCK, DONALD E. HACKETT, JAMES F. FREITAS, VICTOR K. LAMAY, DONALD B. BLOCK, CHARLES R. GIDEON, JOSEPH B. HYLAND, BENJAMIN H. GOWEN, DALE K. MILLER each upon his own behalf and as a member of a class similarly situated,

Plaintiffs,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, a Voluntary Association, AIRLINE PILOTS ASSOCIATION, a Voluntary Association, and NORTHWEST AIRLINES, INC., a corporation,

Defendants.

NO. 6069

PETITION FOR REMOVAL

The Defendants pursuant to 28 U.S.C., Sec. 1441, petition this court to enter an order removing from the Superior Court of King County, Washington, to this court a proceeding entitled *Duggan, et al vs. International Association of Machinists, et al*, Cause No. 609051. The following statement is submitted pursuant to 28 U.S.C., Sec. 1446:

1. A copy of all process, pleadings and orders served upon the Defendants is attached as "Exhibit A" and incorporated here by reference.

2. A bond with good and sufficient surety guaranteeing

that the Defendants will pay all costs and disbursements incurred by reason of this removal proceeding should it be determined that the case was not removable or was improperly removed has been filed with this court.

3. The state court proceeding which the Defendants seek to remove to this court was commenced on September 26, 1963, by service upon the Defendants of the Summons and Complaint attached hereto. As more fully set forth in "Exhibit A," it is the Plaintiffs' contention that the International Association of Machinists, pursuant to the terms of the Railway Labor Act, 45 U.S.C., Sec. 151, *et seq.*, was the collective bargaining representative of the Plaintiffs and in the course of such representation breached its "duty of fair representation" to the damage of the Plaintiffs. The Plaintiffs further allege that the Defendant Northwest Airlines, Inc., and the Defendant Ailrine Pilots Association knowingly participated in and approved the alleged breach of the "duty of fair representation."

4. Since the "duty of fair representation" is one created by the Railway Labor Act, the Plaintiffs' claim is one which arises under a law of the United States, and accordingly this action is a proper one for removal from the Superior Court of King County to this court, pursuant to the provisions of 28 U.S.C., Sec. 1441.

DATED at Seattle, Washington this 11th day of October, 1963.

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STATE OF WASHINGTON)
COUNTY OF KING) ss

Hugh Hafer after having been duly sworn on oath deposes and states that he is one of the attorneys for the International Association of Machinists and having been authorized to do so makes this verification on behalf of International Association of Machinists. Deponent states that the facts set forth in this petition for removal are true and correct.

/s/ HUGH HAFER

SUBSCRIBED and SWORN to before me this 11th day of October, 1963.

/s/ THOMAS K. CASSIDY
Notary Public in and for the
State of Washington, residing
at Seattle.

STATE OF WASHINGTON)
COUNTY OF KING) ss

W. Wesselhoeft after having been duly sworn on oath deposes and states that he is one of the attorneys for the Airline Pilots Association and having been authorized to do so makes this verification on behalf of Airline Pilots Association. Deponent states that the facts set forth in this petition for removal are true and correct.

/s/ W. WESSELHOEFT

SUBSCRIBED and SWORN to before me this 11th day of October, 1963.

/s/ VIRGINIA H. BECK
Notary Public in and for the
State of Washington, residing
at Seattle.

STATE OF WASHINGTON)
COUNTY OF KING) ss

W. R. McKelvy, after having been duly sworn on oath deposes and states that he is one of the attorneys for the Northwest Airlines, Inc., and having been authorized to

do so makes this verification on behalf of Northwest Airlines, Inc. Deponent states that the facts set forth in this petition for removal are true and correct.

/s/ W. R. McKELVY

SUBSCRIBED and SWORN to before me this 11th day of October, 1963.

/s/ W. PAUL UHLMANN
Notary Public in and for the
State of Washington, residing
at Seattle.

APPENDIX B

Text of Constitutional and Statutory Provisions Involved

The United States Constitution:

Article I, Section 8 of the Constitution provides, in pertinent part:

> "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . ."

Article VI, Cl. 2, of the Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Railway Labor Act, 45 U.S.C.A. § 151:

Definitions

When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however*, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and di-

rected upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of . . . movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; and the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

45 U.S.C.A. § 151a General Purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C.A. § 152 General duties—Duty of Carriers and employees to settle disputes

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Designation of representatives

Third. Representatives, for the purposes of this chapter, shall be designated by the respective party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit

a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Agreements to join or not to join labor organizations forbidden

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Conference of representatives; time; place; private agreements

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

Seventh. No carrier, its officers, or agents shall change

the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Notices of manner of settlement of disputes; posting

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Disputes as to identity of representatives; designation by Mediation Board; secret elections

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coer-

cion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

45 U.S.C.A. § 181 Application of sections 151 to 152 and 154 to 163 to carriers by air

All of the provisions of sections 151 to 152 and 154 to 163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

45 U.S.C.A. § 182 Same; duties, penalties, benefits, and privileges

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of sections 151 to 152 and 154 to 163 of this title shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title.

28 U.S.C.A. § 1441 Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the dis-

trict and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C.A. § 1446 Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or

otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

June 25, 1948, c. 646, 62 Stat. 939; May 24, 1949, c. 139, § 83, 63 Stat. 101; Sept. 29, 1965, Pub.L. 89-215, 79 Stat. 887.